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Settlement of commercial disputes

Form of arbitration agreement

Note by the Secretariat

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Introduction

1. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission decided that one of the priority items for the Working Group should be the requirement of written form for the arbitration agreement contained in article 7, paragraph (2), of the UNCITRAL Model Law on International Commercial Arbitration ("the Arbitration Model Law").[1] The Working Group considered the possible preparation of a harmonized text on the writing requirement at its thirty-second (Vienna, 20-31 March 2000),[2] thirty-third (Vienna, 20 November-1 December 2000),[3] thirty-fourth (New York, 21 May-1 June 2001),[4] thirty-sixth (New York, 4-8 March 2002),[5] forty-third (Vienna, 3-7 October 2005),[6] and forty-fourth (New York, 23-27 January 2006)[7] sessions.

2. When the Working Group considered the issue of the requirement of written form for the arbitration agreement at its thirty-second session, it was generally observed that there was a need for provisions which conformed to current practice in international trade. It was also noted that national courts increasingly adopted a liberal interpretation of those provisions in accordance with international practice and the expectations of parties in international trade.[8]

3. It is recalled as well that the Working Group's intention in revising article 7 of the Arbitration Model Law has been to update domestic laws on the question of the writing requirement for the arbitration agreement, while preserving enforceability of such agreements as foreseen in the New York Convention. To achieve that purpose, two options had been presented, the first gave a detailed description of how the writing requirement could be satisfied (the revised draft article 7) and the other deleted the writing requirement altogether (the alternative proposal). Views were expressed that both the alternative proposal and the revised draft article 7 provided useful options to address concerns relating to the writing requirement.[9] A suggestion was made and adopted by the Working Group at its forty-fourth session that both the revised draft article 7, as amended by the Working Group, and the alternative proposal would be offered to States as alternative texts.[10]

I. Draft legislative provisions on the form of arbitration agreement

4. The texts of the revised draft article 7 and the alternative proposal, as adopted by the Working Group at its forty-fourth session, read as follows.[11]

1. Revised draft article 7 of the Arbitration Model Law

Article 7. Definition and form of arbitration agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

2. Alternative proposal

Article 7. Definition of arbitration agreement

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

II. Notes on the draft legislative provisions on the form of arbitration agreement

1. Notes on the revised draft article 7 of the Arbitration Model Law

Paragraph (1)

5. Paragraph (1) reproduces article 7, paragraph (1), of the Arbitration Model Law.[12]

Paragraph (2)

6. Paragraph (2) reproduces the first sentence of article 7, paragraph (2), of the Arbitration Model Law, and is consistent with the language of article II, paragraph (2), of the New York Convention.[13]

Paragraph (3)

7. Paragraph (3) defines the writing requirement.[14]

General remarks

8. Paragraph (3) of the revised draft article 7 sought by way of a definition to clarify how the writing requirement could be fulfilled. At its forty-fourth session (New York, 23-27 January 2006), the Working Group discussed whether the purpose

of the writing requirement was to provide a record as to the consent of the parties to arbitrate or as to the content of the arbitration agreement.[15] After discussion, the Working Group was generally of the view that what was to be recorded was the content of the arbitration agreement as opposed to the meeting of the minds of the parties or any other information regarding the formation of the agreement, and therefore, reference to the content of the arbitration agreement would be appropriate in the text of paragraph (3).[16] In that context, it was pointed out that paragraph (3) dealt with the definition of the form of the arbitration agreement and the question whether the parties actually reached an agreement to arbitrate was a substantive issue to be left to national legislation.

9. It might be recalled that the intention of the Working Group was to ensure that the revised provision on the definition of the form of the arbitration agreement would encompass a variety of situations, including the case where a maritime salvage contract was concluded orally through radio with a reference to a pre-existing standard contract form containing an arbitration clause, such as the Lloyd's Open Form; contracts concluded by performance or by conduct (for example, a sale of goods under article 18 of the United Nations Convention on Contracts for the International Sale of Goods), with reference to a standard form containing an arbitration clause, such as documents established by the Grain and Food Trade Association (GAFTA); and contracts concluded orally but subsequently confirmed in writing. A mere reference in an oral contract to a set of arbitration rules or to a law governing the arbitral procedure to the extent the parties did not agree on any procedural rules are cases which are not intended to be addressed by that paragraph.

10. The Working Group agreed that further clarification in any explanatory material accompanying that provision, such as a guide to enactment and use, might be needed as to the factual situations that were intended to be covered by paragraph (3).[17] The Commission might wish to discuss the revised draft article 7 in the light of the factual situations listed below with a view to determining whether the draft adequately covers them, to the extent the Commission intends them to be covered.

Factual situations

11. At its thirty-second session[18] (Vienna, 20-31 March 2000), the Working Group considered several typical examples of situations where the parties agreed on the content of a contract containing an arbitration agreement and where there was written evidence of the contract, but where, nevertheless, current law, if interpreted narrowly, might be construed as invalidating or calling into question the validity of the arbitration agreement.[19]

12. The situations in (a) to (h) below are those where the parties have entered into a contract containing an arbitration clause but the form of that clause might be considered as not meeting the statutory requirement:

(a) A contract containing an arbitration clause is formed by one party sending written terms to another party, and that latter party fulfils its obligations under the contract without returning or making any other "exchange" in writing in relation to the terms of the contract;

(b) A contract containing an arbitration clause is formed on the basis of a text proposed by one party, which is not explicitly accepted in writing by the other party, but that latter party refers in writing to a contract in subsequent correspondence, invoice or letter of credit by mentioning, for example, its date or contract number;

(c) A contract is concluded through a broker who issues the text evidencing what the parties have agreed upon, including the arbitration clause, without there being any direct written communications between the parties;

(d) A reference is made in an oral agreement to a written set of terms, which may be in standard form, that contain an arbitration agreement;

(e) Bills of lading incorporate the terms of the underlying charter party by reference;

(f) A series of contracts are concluded between the same parties in a course of dealing, where previous contracts have included arbitration agreements but the contract in question has not been evidenced by a signed writing or there has been no exchange of writings for the contract;

(g) The original contract contains an arbitration clause, but there is no arbitration clause in an addendum to the contract, an extension of the contract, a contract novation or a settlement agreement relating to the contract (such a "further" contract may have been concluded orally or in writing);

(h) A bill of lading contains an arbitration clause that is not signed by the shipper or the subsequent holder.

13. The situations in (a) to (d) below refer to cases where it may be assumed that the arbitration agreement has been validly entered into by one set of parties and the question relates to the substantive issue of whether that arbitration agreement has become binding on a third party who later becomes party to the contract or assumes certain rights and obligations arising out of the contract:

(a) Third party rights and obligations under arbitration agreements contained in contracts which bestow benefits on third party beneficiaries or stipulation in favour of a third party (*stipulation pour autrui*);

(b) Third party rights and obligations under arbitration agreements following the assignment or novation of the underlying contract to the third party;

(c) Third party rights and obligations contained in arbitration agreements where the third party exercises subrogated rights;

(d) Rights and obligations contained in arbitration agreements where interests in contracts are asserted by successors to parties, following the merger or demerger of companies, so that the corporate entity is no longer the same.

14. It might be noted that the Working Group considered that the fact that the oral conclusion of certain types of contracts may be a customary practice in certain fields of trade or that arbitration agreements in certain types of contracts may be customary had more to do with substantive conditions for finding that an agreement to arbitrate had been reached than with its form. Since it was desirable that the model provision limits itself to issues of form and not deal with substantive conditions for the validity of arbitration agreements, the question of what was

customary and how agreement between the parties was reached was considered as falling outside the model provision.[20]

Paragraph (4)

15. The language used in paragraph (4) was consistent with that used in paragraph (2) of article 9 of the United Nations Convention on the Use of Electronic Communications in International Contracts ("the Convention on Electronic Contracts") and the definitions of "electronic communication" and "data message" reproduced the definitions contained under subparagraphs (b) and (c) of article 4 of the Convention on Electronic Contracts.[21]

Paragraph (5)

16. The provisions of paragraph (5) were included under article 7, paragraph (2), of the Arbitration Model Law, and the Working Group agreed to retain that paragraph.[22]

Paragraph (6)

17. The Working Group recalled that a principal purpose of paragraph (6) was to confirm the formal validity of arbitration agreements incorporated by reference. For example, parties might conclude by performance a contract whose terms were established in a standard form but that form might, in turn, not contain within it an arbitration clause but might, instead, incorporate an arbitration clause by reference to another document that contained its terms.[23] The Working Group agreed that, as a matter of general policy, the reference or other link to a written contractual document containing an arbitration clause should be sufficient to establish the formal validity of the arbitration agreement, and that domestic or other applicable law should determine whether the reference was such as to make that clause part of the contract or the separate arbitration agreement, notwithstanding that the contract or the separate arbitration agreement had been concluded orally, by conduct or by other means not in writing.[24]

2. Notes on the alternative proposal

18. The alternative proposal omitted entirely the writing requirement. Under that provision, oral arbitration agreements would be recognised as valid. In support of the alternative proposal, it was said that many national laws contained requirements as to form for arbitration agreements that could be regarded as outdated. It was noted that, in several jurisdictions that had removed the written form requirement for arbitration agreements, oral arbitration agreements were rarely used and had not given rise to significant disputes as to their validity.[25]

19. That alternative proposal was seen as establishing a more favourable regime for recognition and enforcement of arbitral awards than was provided for under the New York Convention, and therefore, by virtue of the "more favourable law provision" contained in article VII, paragraph (1), of the New York Convention, the Arbitration Model Law would apply instead of article II, paragraph (2), of the New York Convention.

20. While the proposed new text was considered useful to highlight the problems raised by the written form requirements, it was said that removal of the form requirement and of every reference to "writing" could create uncertainty.[26]

21. The Commission might wish to consider whether the alternative proposal should be retained and, in the affirmative, the form in which the revised draft article 7 and the alternative proposal might be presented in the Arbitration Model Law.

III. Amendment to article 35, paragraph (2), of the Arbitration Model Law

22. Article 35, paragraph (2), of the Arbitration Model Law, modelled on article IV of the New York Convention, provides that the party relying on an award or applying for its enforcement should supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. In considering the drafts regarding the writing requirement for an arbitration agreement, the Working Group considered it necessary to ensure that a modified understanding of the writing requirement (article 7, paragraph (2), of the Arbitration Model Law and article II, paragraph (2), of the New York Convention) be reflected in article 35, paragraph (2), of the Arbitration Model Law, by amending that article as follows:[27]

Article 35, paragraph (2), of the Arbitration Model Law

The party relying on an award or applying for its enforcement shall supply the original award or a certified copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a certified translation thereof into such language.

IV. Explanatory material

23. At its forty-fourth session (New York, 23-27 January 2006), the Working Group agreed that explanatory material in relation to the legislative provisions on the form of arbitration agreement could be drafted along the lines of the existing explanatory note to the Arbitration Model Law and that such text could replace the current paragraphs 18, 19 and other affected paragraphs of that explanatory note. In addition, the Secretariat was requested to provide more detailed information on the form of arbitration agreement to enacting States in a guide to enactment and use of the revised provisions.[28] The Commission might wish to provide further guidance on that matter.

24. When the Commission considered the possibility of preparing model legislation, it was suggested that any model legislation that might be prepared with respect to the form of arbitration agreement might include a provision along the lines of article 7 of the United Nations Convention on Contracts for the International Sale of Goods, which is designed to facilitate interpretation by reference to internationally accepted principles. Similar provisions were included in the UNCITRAL Model Law on Electronic Commerce[29] and the UNCITRAL Model

Law on Cross-Border Insolvency.[30] It was said that such a non-binding commentary formulated by the Commission along with the model legislative provision could speed up the process of harmonization of law and its interpretation. The Commission might wish to decide whether such provision needs to be included.[31]

Notes

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), paras. 344-350 and para. 380.

[2] A/CN.9/468, paras. 88-106.

[3] A/CN.9/485, paras. 21-59.

[4] A/CN.9/487, paras. 22-41.

[5] A/CN.9/508, paras. 18-39.

[6] A/CN.9/589, paras. 108-112.

[7] A/CN.9/592, paras. 46-81.

[8] A/CN.9/468, para. 88.

[9] A/CN.9/589, paras. 110-112.

[10] A/CN.9/592, para. 74.

[11] Ibid., paras. 46-75 and annex II.

[12] Ibid., para. 49.

[13] Ibid., paras. 50-59.

[14] Ibid., para. 59.

[15] Ibid., para. 57.

[16] Ibid., paras. 61 and 62.

[17] Ibid., para. 62.

[18] A/CN.9/468, para. 95; A/CN.9/WG.II/WP. 108/Add.1, para. 12 and A/CN.9/WG.II/WP.110, paras. 16-26.

[19] These fact situations were listed in para. 12 of document A/CN.9/WG.II/WP.108/Add.1 and paras. 16-26 of document A/CN.9/WG.II/WP.110. Among them was also the case where a claimant seeks to initiate an arbitration against an entity not originally party to the arbitration agreement, or where an entity not originally party to the arbitration agreement seeks to rely on it to initiate an arbitration, for example, by relying on the "group of companies" theory. However, the Working Group considered that that situation raised difficult issues and the idea of a harmonised rule did not gain wide acceptance. (A/CN.9/468, para. 95).

[20] A/CN.9/485, paras. 39-41 and A/CN.9/592, para. 72.

[21] A/CN.9/592, para. 64.

[22] Ibid., paras. 65-68.

[23] Ibid., para. 69.

[24] Ibid., and A/CN.9/508, paras. 27-31.

[25] A/CN.9/592, para. 47.

[26] A/CN.9/589, para. 110.

[27] A/CN.9/592, paras. 76-80 and annex II.

[28] Ibid., para. 81.

[29] Article 3:"(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based."

[30] Article 8: "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."

[31] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 348 and A/CN.9/WG.II/WP.108/Add.1, para. 23.